140-142

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 1117.

THE UNITED STATES, APPELLANT,

vs.

HENRY O. EWING.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TENNESSEE.

FILED FEBRUARY 20, 1890.

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1 *Prosecution bond, filed 25th day of July, 1889.*

HENRY O. EWING
vs.
THE UNITED STATES. } #23.

In the district court of the United States for the southerd division of the easterd district of Tennessee.

Know all men by these presents, that we, Henry O. Ewing and C. D. Clark, are held and firmly bound unto the United States in the penal sum of $250.00, to the payment whereof we bind ourselves and each of us and each of our several heirs, executors, and administrators jointly and severally firmly by these presents.

Witness our hands on this the 25th day of July, 1889.

The condition of this b'nd is such that the said Henry O. Ewing commenced suit against the United States for debt. Now, if the said Henry O. Ewing shall prosecute said suit with effe't or on failure thereof pay and satisfy all costs that may be adjudged against said plaintiff in said cause, or on failure of said defendant, if convicted, to pay and satisfy said costs, if the said plaintiff shall pay the same, then this bond to be void, otherwise to remain in full force and virtue.

HENRY O. EWING. [SEAL.]
C. D. CLARK. [SEAL.]

2 *Original Petition? Filed* 1889, *July 25th. Hu. L. McClung, clerk, by Henry O. Ewing, deputy clerk.*

To the honorable D. M. Key, district judge of the United States, presidibg at Chattanooga, in and for the Southern division of the eastern district of Tennessee:

HENRY O. EWING, PETITIONER, A CITIZEN OF
of Hamilton County, Tennessee,
against
THE UNITED STATES.

Your petitioner respectfully represents and shows to your honor that he is a United States commissioner in and for the eastern district of Tennessee, holding his office by proper and legal appointment and qualification, with the rights, powers, and obligations belonging to such office. Your petitioner further shows that he has regularly discharged the duties of said office since the date of his appointment and that in so doing certain fees became due to him from the United States; that he has rendered to the First Auditor of the Treasury accounts for his services, but did not include therein certain charges for services, which charges and the reasons for not so presenting will be hereinafter shown. That your petitioner would receive in reply to said accounts certain "statements of accounts" from the First Comptroller of the Treasury, in which large amounts of fees earned and due to your petitioner were disallowed under the rulings of the said Comptroller, said "statements of account" from the Comptroller are copies of originals in his office and are each numbered by said Comptroller, and will be herein referred to by said numbers; and said

copies furnished your petitioner will be exhibited on the trial of this cause or at an accounting if the court should direct such to be had.

3 Your petitioner further shows that the following are the amounts due to him which have become due during the period from January the 3rd, 1887, to April the 1st, 1889, and have been disallowed as above stated since the passage of the act under which this suit is brought; and that all of said charges have received the approval order of court and were not otherwise objected to, except as to the legality of the fees charged.

First. For issuing mittimuses disallowed as temporary, when, in fact, issued after examination and really for court, and bond was afterwards taken before the meeting of the court:

In statement	102940	$8.75
"	105099	$2.50
		$6.25

Second. For temporary mittimuses, being disallowed by the Comptroller as unnecessary, on the ground that the warrant of arrest is sufficient to hold defendant or commit until examination.

In statement	106528	$8.75
"	108317	2.50
"	109848	11.25
"	110878	1.25
"	112940	7.00
"	113850	12.50
		43.25

Third. For making report of attendance of witnesses, the same being the order to marshal to pay witnesses, disallowed by the Comptroller as an excessive charge.

4	In statement	104268	$2.25
	"	105099	$4.80
	"	106528	$9.00
	"	108317	$4.65
	"	109848	$10.05
	" M	110857	$3.15
	"	112940	$8.10
	"	113850	$14.05
			$56.95

Fourth. For more than one acknowledgement for defendant's recognizances, the Comptroller holding that the acknowledgement is joint and not separate:

In statement	104268	$9.50
"	106528	$7.75
"	108317	$6.00
"	109848	$4.75
"	110857	$2.00
"	110878	$0.80
		$30.50

Fifth. For all acknowledgements to defendant's recognizances, the Comptroller holding acknowledgement unnecessary:

In statement	112940	$9.50
"	113850	$19.50
		$29.00

Sixth. For drawing complaints disallowed, as not authorized under the fee bill:

In statement	℔112940	$11.10
"	℔113849	$5.40
"	℔113850	$20.10
		36.60

5 Seventh. For entering returns to process, Comptroller holding this service not required of commissioners:

In statement	℔112,949	$9.25
"	℔113,850	$15.45
		$24.70

Eighth. For writing out testimony, Comptroller holding charge not authorized by the fee bill:

In statement	℔113,850	$11.80

Ninth. Fee of dockets, indexes, etc.:

In statement	℔112,796	$488.00
"	℔113,850	$77.00
		$565.00

Tenth. For per diem fee in case against Maggie Clift, where three witness' were heard on the first day and the case continued at defendant's request:

℔102940	$5.00

Eleventh. Per diem fee in case against Martin Turner:

℔108317	$5.00

Twelfth For per diem fee in case against James Johns:

℔109848	$5.00

Thirteenth. For per diem fee in case against S. L. Marshbanks:

In statement	℔112940 $5.00

Fourteenth. For charges in case against Rufus Coker, suspended to know why case not joined with case against Dave Bryant:

In statement	℔106528 $4.90

6 Your petitioner further shows that he is entitled to fees in the following cases, all rendered between January the 3rd, 1887, and April the 1st, 1889, in which no account has been presented to the First Auditor because on the 31st of May, 1889, H. B. Lindsay, U. S. attorney for the eastern district of Tennessee, declined to present said account to the court for order of approval by an endorsement on the account, in which said attorney stated that his refusal and rejection went solely to the legality of the fees claimed, and as to the institution of the prosecutions said account was approved.

Fifteenth. For per diem fees in the following cases, in which defendant had been indicted and was brought before me on an order of court requiring his removal to Chattanooga:

Apl. 17th, 1888, John Flowers, Ind. ℔1078	$5.00
Apl. 8th, 1888, Joe Long, Ind. ℔970	$5.00

Sixteenth. For per diem fees in case upon attachment for contempt where defendant was brought before me and committed to jail:

Apl. 5th, 1887, Isaac Moore $5.00

Seventeenth: For per diem fee in case, where defendant was arrested in this county, on descriptive letter from Bradley County; deft. was held and committed to jail until deputy marshal came from Bradley County, identified and took defendant there for trial:

Dec. 11th, 1887, John Jarrett $5.00

Eighteenth. For per diem fee where defendant was surrdndered to me by his bondsman and committed to jail:

Oct. 8th, 1887, James Smith $5.00

Nineteenth: For per diem fees in the following cases, in which defendant was brought before me on a capias from the U. S. circuit court and bond taken or committed to jail:

7	Feb'y 21st, 1888, William Worthington, Ind., #1002	$5.00
	Ap'l 13th, 1888, Frank Warner, Ind., #1004	5.00
	Ap'l 14th, 1888, Jackson C. Heaton, Ind., #1087	5.00
	Ap'l 6th, 1888, Harry Roberts, Ind., 1085	5.00
	Oct. 10th, 1887, Jack Bettis, Ind., #982	5.00
	Ap'l 24th, 1888, G. W. Culbertson, Ind., #1082	5.00
	Sept. 18th, 1888, Dick McDowell, Ind., #1066	5.00
	Oct. 12th, 1887, William Wilkin, Ind., #1030	5.00
	Dec. 21st, 1887, Frank Warner, Ind., #1004	5.00
	Feb'y 23d, 1888, Tom Hale, Ind., #1003	5.00
	Ap'l 25th, 1887, B. F. Talley et al., Ind. #831	5.00
	May 2nd, 1887, Jack Smith, Ind., #953	5.00
	Ap'l —th, 1887, Randall Owens, Ind., #917	5.00
	Ap'l 8th, 1887, J. W. Dame, Ind., #115	5.00
	Ap'l 4th, 1887, J. M. Long, Ind., #99	5.00
	Oct. 5th, 1887, Merritt Mealer, Ind., #919	5.00

Twentieth: For per diem fees in which defendant was committed to jail at Chattanooga by John E. Pyott, commissioner, at Spring City, there being no jail at Spring City, and subsequently brought before me to give bond.

June the 27th, 1887, W. F. Worthington $5.00
July the 6th, 1887, Pleas Edmonds 5.00

Twenty-first: Dockets, indexes, etc., in the following cases, in which warrant and subpœna was issued by me and the return made before another commissioner, the warrant and subpœna having been charged for in my account for the quarter ending March 31st, 1889.

William E. Pass, James Allin, Scott Cain, Boyd Dodson, William Hitchcock, Thomas Johnson, Boyd Dodson, Little Cagle, Noah Hyder, Hugh Parrish, James Mullins, Calvin Kirk, James Holt, Wilts Burchfield, Jerry Frtitz, John Thompson, Joe Iseminger, John M.
8 Hixon, Milton Carroll, William Williams, Robert Webb, Bill Grigsby, John Hodges, Elms Fisher, Nathaniel Evans, Henry Pankey, Andrew Lowry, Brown McReynolds, John M. Hurd, Barnett Thomas, John Addison, Prince Gorman, William Lowry, J. M. Billingsly, Tom Swofford, Jesse Skillern, Eddie Hurd, Daley White, Samuel Miller, Sam Pankey, William Bromley, and N. M. Clapp—

12 cases, at $1.00 each $12.00

Twenty-second. Dockets, indexesm, etc., in the following cases, the

same as in #21, except that marshal dismissed the case without executing the warrant, which is returned to me with the marshal's reasons for not executing it:

Charles Wallace, Ben Proctor, Geo. Walker, Thomas F. Smith, Kagey John Thurman, J. R. Cole, Wash Coppinger?, Ike Lindsay, Linda Lively, Joe Lively, Noag Carl, Alfred Gardner, Joe Phillips, James J. Smith, Jack Smith, Dick Angel, M. Lively, Tom. Roberts, ——— Higgs, Tom Phillips, and John Waller—

21 cases, at $1 00 ..... $21.00

Petitioner further shows that he has performed said services in good faith, and is justly and legally entitled to the above fees as he is advised, and for the purpose of recovering the same he brings this petition and suit for nine hundred and ninety-five and fifteen one-hundredths dollars ($995.15).

Your petitioner therefore prays judgment for said claim in legal form, and all such other further and general relief in the premises as may be legal, just, and proper; and that said judgment be paid in the usual and legal way.

C. D. CLARK,
Solicitor for Petitioner.

9 STATE OF TENNESSEE, *Hamilton County:*

Personally came before me Henry O. Ewing, the foregoing petitioner, and made oath that the facts stated in the foregoing petition are true to the best of his knowledge, information, and belief.

HENRY O. EWING.

Subscribed and sworn to before me this 25th day of July, 1889.

[SEAL.] C. C. EVERETT,
Deputy Clerk.

10 *Affidavit of service on the district attorney filed July 30th, 1889*
(*Henry O. Ewing, deputy clerk.*)

J. H. Peoples, deputy marshal of the United States for the eastern district of Tennessee, being duly sworn, deposes and says that on the 29th day of July, 1889, I received a copy of the petition in the United States district court at Chattanooga in the case of Henry O. Ewing vs. The United States, that the said copy was duly certified under seal by the clerk of said court, that on the 29th day of July, 1889, I served on and left with H. B. Lindsay, U. S. att'y for eastern district of Tennessee, said copy.

J. H. PEOPLES,
Deputy U. S. Marshal.

Sworn and subscribed to before me this 29th day of July, 1889.

[SEAL.] H. H. TAYLOR,
Clerk.

By J. T. CARTER,
Deputy Clerk.

(Endorsed:) J. H. Peoples, deputy United States marshal. Bill of cost $2.00.

11 *Receipt from W. H. H. Miller, Attorney-General, of copy by registered mail, filed* 1889, *July* 31*st* (*Henry O. Ewing, deputy clerk*).

Registry return receipt, sent July 25th, 1889.
Reg. No. 444. From post-office at Chattanooga, Tennessee. Reg. letter, addressed to Attorney-General, post-office at Washington, D. C.
After obtaining receipt below, the postmaster will mail this card without cover and without postage to address on the other side.
Received the above-described registered letter.
(Sender's name on other side.)
Sign on dotted lines to the right.

W. H. H. MILLER,
By J. J. HANEY.

When delivery is made to other than addressee the name of both addressee and recipient must appear.
Erase letter or parcel according to which is sent 29270.
When the registered letter or parcel accompanying this card is delivered, the postmaster will require signature to the receipt on the other side, also on his record of registered deliveries, and mail this card without cover to address below.
A penalty of $300.00 is fixed by law for using this card for other than official business.
Post-Office Department, official business. Post-office at .
Stamp here name of post-office and date of delivery. Washington, D. C., Jul. 29, 1889.
Return to
Name of sender Clerk's office.
Street and number or post-office box, S. Court.

12 Post-office at Chattanooga, County of Hamilton, State of Tennessee.

Answer. Filed October 7th 1889 (*Henry O. Ewing, deputy clerk*).

The answer of the United States of America to the petition filed in the U. S. dist. court, at Chattanooga, in the southern division of the eastern dist. of Tenn., by Henry O. Ewing, the same being numbered 23 on the docket of said court.
For answer to such parts of said petition as is material and necessary for respondent to answer and, sw'ring, says: Respondent admits that complainnant is and was a commissioner of the United States circuit court during the time claimed in said petition, but denies that complt. necessarily performed the services charged for, and demands proof of the same. Respt. denies its liability to complt. for any of the services claimed in said petition, and now having full answered respt., prays to be dismissed with its reasonable costs.

THE U. S. OF AMERICA,
By H. B. LINDLAY,
U. S. Dist. Atty., East. Dist. of Tenn.

13 Circuit court of the United States, October term, 1881.

Order of court.

The United States circuit court commissioners for this district are hereby instructed not to issue any warrant for the arrest of any person charged with a violation of the revenue laws unless he shall be requested in writing by the district attorney for the district, or his assistant, to do so; or unless the collector of internal revenue for the district, or one of his deputies, shall make and attach an affidavit substantially setting forth that the affiant has carefully enquired into the alleged offense; that it is, as he believes, an offense that ought to be prosecuted, and that there is probable cause for the arrest of the accused.

But the restrictions hereinbefore imposed shall not apply in cases of emergency, in which, in the judgment of the commissioner, a warrant ought to be issued before such preliminary authority from the district attorney can be applied for and obtained or such oath of the collector or deputy collector can be made. Said warrant shall be made returnable before any commissioner of the district, and the marshal or deputy marshal making the arrest is requested to take the accused for examination before the commissioner most convenient to the accused and the witnesses in the case.

Each commissioner will keep a docket, showing the issuance of warrant, upon whose complaint the same was issued, the nature of the offense charged, and the officer to whom delivered for execution. And when a warrant is returned, he will in all cases write out substantially the evidence of each witness as given before him, and return the same to the clerk of this court, for the information of the district attorney. He will also give the names of the witnesses present, with the amount of their fees; the names of the guards, if any, and the fees due such guards, the marshal, deputy marshal, and himself; the mileage and other expenses allowed by law, and transmit as soon thereafter as may be practicable all the papers in the case to the clerk of this court for inspection and preservation. The commissioner will further make monthly duplicate reports to the clerk of this court, one for the use of the court and the other for the Department of Justice, to be made upon such forms as may be supplied by said Department of Justice, through the clerk. And the clerk is hereby charged with the duty of transmitting one of said duplicates, as they shall be from time to time received, to the Attorney-General.

This order is entered to take the place and supercede all orders heretofore made in relation to the subject embraced herein, and the clerk is directed to furnish the marshal and each commissioner of the district with a certified copy of the same.

A true copy.

Attest:

[SEAL.] HENRY O. EWING, *Dept. Clerk.*

Rule of court. Filed 1889, Oct. 14th.

HENRY O. EWING, *Dept. Clk.*

Order for payment to witnesses for their attendance at a commissioner's court held at Chattanooga, Tennessee, before Henry O. Ewing, a commissioner appointed by the circuit court of the United States for the eastern districts of Tennessee, on the 29th day of Feb'y 1889.

THE UNITED STATES
vs.
I. B. SMITH.
} Charge: Violation internal-revenue law.

The persons hereinafter mentioned having severally attended this court in the aforesaid cause as witnesses on the part of the United States, the number of days hereinafter specified, and having respectively traveled the number of miles hereinafter stated, and they being severally entitled thereto, it is ordered that the marshal pay to each of said witnesses the sum set opposite their respective names, amounting in the aggregate to nineteen dollars and twenty-five cents.

Dated Feb'y 29, 1889.

HENRY O. EWING,
U. S. Commissioner.

Name of witness.	Residence.	For attendance.		For travel.		Total.	Original signature for amount paid each.	Witness to signature by mark.
		Days.	Amount.	Miles.	Amount.			
John G. Rawlings	St. Elmo, Tenn	1	1.50	105	5.25	6.75	John G. (his x mark) Rawlings	Henry O. Ewing.
J. C. Henderson	" "	1	1.50	95	4.75	4.75	J. C. (his x mark) Henderson	Henry O. Ewing.
A. W. Poe	" "	1	1.50	110	5.50	5.50	A. W. (his x mark) Poe	Henry O. Ewing.
H. R. Pinion	" "	1	1.50	40	2.00	2.00	H. R. (his x mark) Pinion	Henry O. Ewing.
Grand total						19.00		

Note 1—Signatures by mark must be witnessed.
" 2—Forward this in duplicate at the close of each trial.
" 3—Do not fill blanks on back of this sheet

353 words in duplicate 706 words.

Voucher No. ——.

Order to pay witnesses filed 1889, Oct. 14th.

HENRY O. EWING. *Dep'l. Clerk.*

(Indorsed:) Voucher No. ——. Witness fees. The United States vs. I. B. Smith. Before U. S. Commissioner Henry O. Ewing. Year ending June 30, 188—. $99.25.

15 *Agreement, filed* 1889, *October* 14*th* (*Henry O. Ewing, deputy clerk*).

HENRY O. EWING, UNITED STATES COMMISSIONER
vs.
THE UNITED STATES. } #23.

In this cause on behalf of def't I admit the actual performance of the services for which claim is made in the petition and rely upon the defense of the illegality of said charges, and that it was not necessary to perform said services.

October 14th, 1889.

H. B. LINDSAY,
United States District Attorney Eastern District of Tennessee.

Opinion of the court filed Nov. 23rd, 1889 (*Hu. L. McClung, clerk, by Henry O. Ewing, D. C.*).

HENRY O. EWING
vs.
THE UNITED STATES.

District court, eastern district of Tennessee.

This suit was brought under the act of Congress of March 3, 1887, allowing certain claims to be prosecuted in this court. The petitioner claims that he is and has been a commissioner of the United States circuit court, and as such officer is entitled to the of $995.15, which the First Comptroller of the Treasury has refused to allow him. It is conceded that the record shows that the services for which claim is made have been performed, but it is contended on the part of the Government that he is not en-

16 titled to the items disallowed.

The first and second items are for warrants of commitment, some temporary and some final, amounting to $49.50. These ought to have been allowed. The last code of Tennessee only embraces the previous law of the State, which authorizes the justices of the peace to commit defendants in criminal investigations before them; the commissioner has the same power. (See Hoyne vs. U. S., 38 Fed. Rep., 544.)

The third item in dispute is for $56.95, for making report of attendance of witnesses to the marshal being the order to pay them. Recent action of the Comptroller indicates that the charge is proper and should be allowed, in which opinion I concur. It appears, however, that $14.95 of this item has been allowed, so that when this is deducted from the aggregate amount it leaves due petitioner on this part of his claim $42.00.

The fourth and fifth items amount to $59.50 and are for acknowledgments of the recognizances of defendants and theur sureties.

Following the decisions of Barbour vs. U. S., 35 Fed. Rep., 888, and Rand vs. U. S., 36 Fed. Rep., 673, this branch of the claim should be allowed.

Late action of the Comptroller concedes that the sixth item of the claim should have been allowed; of this item, amounting to $36.60, there has been allowed $25.50, so that petit oner is entitled in this respect to $11.10 only.

The seventh item is for $21.70, for entering returns to process. Late action of the Comptroller admits that such a charge is proper. The Register of the Department of Justice for 1886, page 285, corroborates this view and so do Barbour vs. U. S., 35 Fed. Rep., 88 ., and Rand vs. U. S., 36 Fed. Rep., 671, but as $15.45 of this item have been allowed there remains due on this branch of the case $9.25.

Item eighth is for $11.80 for writing out testimony; this item
17 should have been allowed, Barbour vs. U. S., 35 Fed. Rep., 886, and 116 U. S., 400.

Item nine is for fees for dockets, indexes, etc., amounting to $565.00. Judge Jackson, of this circuit, in McDermott vs. U. S., decided recently at Louisville, Ky., and not yet reported, held that docket fees are properly chargeable, notwithstanding the deficiency appropriation bill of August 4, 1886. In accord with this are Bell vs. U. S., 35 Fed. Rep., 889; Rand vs. U. S., 36 Fed. Rep., 671, and Hoyne vs. U. S., 38 Fed. Rep., 543. I conclude, therefore, that this item of $565.00 must be allowed.

The 10th, 11th, and 12th items, amounting to $15.00, ought to be allowed. The trials in each case occupied two days, and petitioner has been allowed per diem for one day only in each. The Comptroller has recently ruled that such an allowance is proper, and Hoyne vs. U. S., 38 Fed. Rep., 543, sustains this view of the case, and I believe it correct.

The thirteenth item is disallowed, as it has been favorably passed upon by the Comptroller since the petition was filed.

The fourteenth item, amounting to $4.90, is allowed. It appears that warrants were issued for two persons for counterfeiting separately. No reason is shown why a joint warrant should have issued, nor does it seem that such a warrant could have properly issued; besides, the presumption is that the Commissioner did his duty until the contrary is established.

Items 15, 16, 17, 18, 19, 20 are disallowed. These charges do not fall within any case that has been decided in which a per diem is charged for "hearing and deciding" a criminal charge. In most of these charges the defendants had been indicted and arrested and nothing remained for them to do but to give bail or to have a mittimus to issue. The cases had heard by the grand jury and decided by that jury. There was nothing
18 for the Commissioner to do which was judicial in its character. If he took bail he would charge for the affidavits, acknowledgements that might be taken. If bail was not given he would issue his warrant of commitment and charge for that. All the other cases included in these items have the same standing in principle as those mentioned.

Items 21 and 22 must be allowed; they fall, as I think under the principle of the decisions of the U. S. vs. Wallace, 116 U. S., 400, and Rand vs. U. S., 38 Fed. Rep., 665. The reasoning of these cases is not only satisfactory but conclusive. The amount of these items is $63.00.

I conclude therefore that petitioner may have a recovery against the United States for the sum of eight hundred and thirty-one dollars and five cents, and it is so decreed.

D. M. KEY,
Judge.

Be it remembered that at a district court of the United States began and held for the southern division of the eastern district of Tennessee, at the

court-house in the city of Chattanooga, within said district and the sixth circuit on the first Monday, it being the 7th day of October, A. D. 1889.

Present and presiding the Hon. D. M. Key, judge of the United States district ciurt for the eastern and middle districts of Tennessee, the following proceedings were had to wit:

SATURDAY, *November* 23*rd*, 1889.

Court met pursuant to adjournment. Present and presiding the Hon. D. M. Key, judge of the United States district ciurt for the eastern and middle districts of Tennessee.

HENRY O. EWING
vs.
THE UNITED STATES. } # 23.

This cause was heard before the Hon. D. M. Key, judge on
19 a former day of the present term of this court, upon the proof and pleadings in this cause, and was taken under advis'ment, and the court now, after due consideration of the case, being of opinion that on items 15, 16, 17, 18, 19, and 20 of the petition, petitioner is not entitled to recover, the same are disallowed and overruled, and the court being further of the opinion that the remaining items of the account sued on are legal and proper charges on which the petitioner is entitled to recover, and it appearing from an inspection of the record and from the admissions of petitioner on the trial of the cause that certain parts of items in the account have been allowed since the instutution of this suit and that after deducting such allowances from said items on which petitioner is entitled to recover there remains now due the petitioner on the items allowed by this decree or judgment eight hundred and thirty-one and five one-hundredths dollars ($831.05).

It is therefore considered by the court that Petitioner Henry O. Ewing have and recover from the United States said sum of eight hundred and thirty-one dollars and five cents, and this judgment will be certified for payment as prescribed by law.

A written opinion was delivered by the court, showing the action of the court, and the reasons therefor, which is ordered to be filed, and made a part of this record.

MONDAY MORNING, *December* 23*rd*, 1889.

Court met pursuant to adjournment. Present and presiding, the Hon. D. M. Key, judge of the United States district court for the eastern and middle districts of Tennessee.

HENRY O. EWING
vs.
THE UNITED STATES. } #23.

Came the parties, by their attorneys, and the district attorney prayed an appeal from the judgment rendered in this cause at the present term to the Supreme Court of the United States, which appeal is granted
20 and the clerk of this court will make out and certify and transmit as required by law a copy of the record in the cause.

21 *Cost bill.*

U. S. district court, E. D. Tennessee. Term, 18 .

HENRY O. EWING *vs.* UNITED STATES. } No. 23.

Clerk's fees.	At—	Plaintiff.	Defendant.
Entering appearance of parties	.15		.90
Drawing, filing, and ack. plf's cost bond			
Issuing process (except for witness)	1.00		
Indorsing cause of action on writs	.15		
Issuing subpœnas for witnesses	.25		
Entering marshal's return on writs, folios	.15		
Filing 6 papers	.10		.60
Indorsing certificate of opening depositions	.15		
Copying 60 folios	.10		6
Certificate and seal to 2 copies	.35		.70
Taking 2 affidavits	.10		.20
Certificate and seal thereto	.35		.70
Indorsing papers, 5 folios	.15		.75
Entering 5 folios on journal	.15		.75
Drawing bonds, folios	.15		
Taking ack's under seal	.45		
Swearing sureties to bond	.10		
Certificate and seal thereto	.35		
Swearing witnesses to testify	.10		
Swearing witnesses to, att. and travel	.10		
Entering folios claims of witnesses	.15		
Issuing certificates of attendance	.10		
Entering on calendar terms	.15		
Entering continuances	.15		
Entering 62 folios complete record	.15		9.30
Making dockets, indexes, etc., $3			3
Commission on amount received, $831.05			8.31
Making copy of cost bill, 2 folios	.10		.20
Transcript, 62 folios, 6.00: cut & seal, 35, for Att'y Gen'l			6.35
" 62 " 9.30; " " 35, " Supreme Court			9.65
General statement.			
Clerk			41.41
Marshal, p'd by plf. to W. S. Tipton, mar			2
Docket fee for C. D. Clark, pl'fs att'y			20
Attorney's fees on depositions			
Plaintiff's notary's fees on depositions			
Defendant's notaries fees on depositions			
Defendant's witnesses fees			
Plaintiff's witnesses fees			
Total			72.41

(Indorsed:) No. 23, U. S. circuit court, E. D. Tenn., vs. . Cost bill. Taxed and filed , 18 . , deputy clerk. Recorded in record No. , page .

22 I, Hu. L. McClung, clerk of the United States district court of the eastern district of Tennessee, do hereby certify that the foregoing 21 pages of words and figures comprise a full, true, and perfect transcript of all the records, pleadings, and proceedings had by said court in the cause wherein Henry O. Ewing is plaintiff and the United States, defendant, #23 on my rule docket, as the same remain of record and on file in my office.

Witness my hand and seal of said court at office in the city of Chattanooga, Tennessee, this 11th day of January, 1890.

[SEAL.] HU. L. MCCLUNG, *Clerk.*

By HENRY O. EWING, *Deputy Clerk.*

23 (Indorsement on cover:) No. 1117. The United States, appellant, *vs.* Henry O. Ewing. E. Tennessee D. C. U. S. Filed February 20, 1890.

Office Supreme Court, U. S.
FILED,
JAN 12 1891
JAMES H. McKENNEY
CLERK

In the Supreme Court of the United States.

OCTOBER TERM, 1890.

THE UNITED STATES, APPELLANT,
vs.
HENRY O. EWING. } No. 1117.

APPEAL FROM THE DISTRICT COURT OF THE UNITE STATES FOR THE EASTERN DISTRICT OF TENNESSEE D

THE UNITED STATES, APPELLANT,
vs.
ROBERT BARBER. } No. 1164.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA.

THE UNITED STATES, APPELLANT,
vs.
SAMUEL THANE POINIER, } No. 1151.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA.

THE UNITED STATES, APPELLANT,
vs.
EDWARD J. McDERMOTT. } No. 1152.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

THE UNITED STATES, APPELLANT,
vs.
A. J. VAN DUZEE. } No. 1244.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF IOWA.

MOTION TO ADVANCE

In the Supreme Court of the United States.

OCTOBER TERM, 1890.

THE UNITED STATES, APPELLANT,
vs.
HENRY O. EWING. } No. 1117.

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17507

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vs.
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THE UNITED STATES, APPELLANT,
vs.
A. J. VAN DUZEE. } No. 1244.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF IOWA.

MOTION TO ADVANCE.

And now, December 12, 1890, comes the Solicitor-General and moves the court to advance the foregoing cases, to be heard at the present term at such time as shall be convenient to the court.

The first two cases involve the legality of fees charged by United States commissioners; the next two cases, of fees charged by chief supervisors of elections; and the last case, of fees charged by the clerk of a U. S. court.

Since the passage of the act of March 3, 1887, giving the circuit and district courts of the United States jurisdiction to entertain suits against the United States, a very large number of actions have been brought by the officers of the United States courts to recover from the United States

judgments for fees disallowed by the accounting officers of the Treasury. Cases of this kind are pending, or have been decided, in the circuit court of nearly every district in the United States. The rulings in these cases have been conflicting. Inextricable confusion now prevails. The accounting officers of the Treasury are without judicial guidance on the subject. It is of the utmost importance that these questions should be decided at an early day by the tribunal of last resort.

There are a number of other cases involving the same questions pending on the docket of this court. The ones named above have been selected as probably including all the questions raised in every case of the kind on the docket. The two commissioners' cases may be heard together. So, the same action may be taken with respect to the supervisors' cases.

The letter of the First Comptroller of the Treasury, addressed to the Secretary and by him referred to the Attorney-General, which is appended, shows somewhat more in detail the confusion which has arisen with respect to accounts of this character, which may now be dispelled by a final decision here.

WM. H. TAFT,
Solicitor-General.

APPENDIX.

TREASURY DEPARTMENT,
FIRST COMPTROLLER'S OFFICE,
Washington, December 22, 1890.

SIR: Cases are now pending in the Supreme Court of the United States involving questions important to the proper administration of the accounting office of the Treasury Department, small in themselves, but expenditures under them in the course of a year amount to a large sum in the aggregate.

The first of these questions is the one of docket fees of commissioners of the circuit court of the United States. For many years it was a much mooted question among these officials whether or not they were entitled to docket fees in cases heard before them. The question finally reached the Supreme Court, and in what is known as the Wallace Case (116 U. S., 398) such a fee was held properly charged when the commissioner was directed by the court to keep a docket. Thereupon Congress, in the act of August 4, 1886 (sundry civil, 24 Stat., 274), declared that "docket fees should not thereafter be charged." The question came before the courts whether the legislation was general or only had application to disbursements of the appropriations contained in the bill. Upon this question the Federal courts do not agree. The language of the statute is, "But they, the commissioners, shall not be entitled to any docket fees."

In the following cases this law was held to be general legislation, to wit: Thornly *vs.* United States (37 Federal Reporter, 762); Strong *vs.* United States (34 Federal Reporter, 17); McKinstry *vs.* United States (34 Federal Reporter, 215); Calvert *vs.* United States (37 Federal

Reporter, 763); Crawford *vs.* United States (40 Federal Reporter, 446); Goodrich *vs.* United States (42 Federal Reporter, 392); Fairs *vs.* United States (38 Federal Reporter, 543); McDermott *vs.* United States (40 Federal Reporter, 217); Phillips *vs.* United States (33 Federal Reporter, 164).

On the contrary, the following cases hold that the legislation was special and had application only to the appropriation bill then before Congress, to wit: Bell *vs.* United States (35 Federal Reporter, 889); Rand *vs.* United States (36 Federal Reporter, 675); Hoyne *vs.* United States (38 Federal Reporter, 543); McDermott *vs.* United States (40 Federal Reporter, 217); Phillips *vs.* United States (33 Federal Reporter, 164).

The Wallace Case was decided upon the ground that the Commissioner was required by an order of the court to keep a docket. In the case of Phillips *vs.* United States (33 Federal Reporter, 164), the court went so far as to hold that the order of the court was unnecessary, and that it was sufficient if a Commissioner kept a docket of his own volition to entitle him to the docket fee allowed clerks of court.

The following cases now pending in the Supreme Court of the United States, at the October term, 1890, involve this question: The United States *vs.* Henry O. Ewing; United States *vs.* Robert Barber, No. 1164.

Also in the case of chief supervisors of elections, the payment of fees, as allowed by the courts, is not uniform. In the Conrad Case (15 Fed. Rep., 64); the Geyer Case (33 Fed. Rep., 625); the Poinier Case (40 Fed. Rep, 189); the several courts hold that the chief supervisors are entitled to a per diem of $5.00, while in the McDermott Case (40 Fed. Rep., 218), it is held that there is no law authorizing the payment.

Under section 2026, R. S., the chief supervisors of elections are required to prepare and furnish all necessary books, forms, blanks, and instructions for the use of the

supervisors of elections. The instructions are generally printed, and contain all the information necessary to a proper understanding of the election laws, State and Federal, and not unfrequently contain a full publication of the election laws themselves. Many chief supervisors charge for such matters 15 cents per folio, under section 2031, R. S., while others simply charge for the expense of printing. The Federal courts in several cases, notably in the Conrad and Geyer Cases, *supra*, and in the McDermott Case and the Poinier Case, now pending in the Supreme Court, hold that the chief supervisor is entitled to the fee of 15 cents per folio for this work. On the other hand, the Court of Claims has uniformly held that no such fee is allowable. See the Muirhead Case (15 C. Claims, 116; and 13 C. Claims, 281). While this office concurs in the opinion of the Court of Claims, the Federal courts do not follow that holding.

The cases now pending at the October term, Supreme Court, 1890, in which both of these questions are involved, are No. 1151, United States *vs.* Poinier, and No. 1152, United States *vs.* McDermott. These cases also involve other points upon which there is a diversity of opinion among the courts. One or two of the courts state that this office allows these fees. This is a mistake; the court has been imposed upon.

The subject of complaints and acknowledgments of recognizances before circuit court commissioners, and the proper fee to be charged therefor, are also subjects of great importance to this office and to those officers. Upon these questions the Federal courts hold both ways. In the case of Strong *vs.* United States (34 Federal Reporter, 17 and 34 Stat., 211) and the Stafford Case No. 15782, lately decided by the Court of Claims, it is held that no fee is allowed in such cases. On the contrary the follow-courts hold that a fee is allowed in such case. Crawford Case (40 Federal Reporter, 446); McKinstry Case (40 id., 813); Heyward *vs.* United States; the case of the *United*

States vs. A. G. Norrell, pending in the Supreme Court at the October term, 1890, involve these among other questions.

In the case of the United States *vs.* A. J. Van Duzee, clerk of the U. S. district court, pending at the October term, 1890, many controverted questions are involved, and if possible I would be pleased to have it tried at this term. From this controversy of opinion, and the confused state of the law, you will readily see that anything like a harmonious administration of this office can not exist until some of these questions are settled by the Supreme Court of the United States. To follow all the opinions is absolutely impossible, and to attempt to harmonize them is equally out of the question. If a disallowance is made, suit is promptly brought, under the act of March 3, 1887, against the United States for the amount.

I respectfully request that you forward this communication, with your approval, to the Attorney-General with the request that he make the proper application to the Supreme Court to advance these cases, to the end that they may be tried at the earliest day possible.

Very respectfully,

A. C. MATTHEWS,
Comptroller.

Hon. WILLIAM WINDOM,
Secretary of the Treasury.

[Indorsement.]

TREASURY DEPARTMENT,
December 23, 1890.

Respectfully referred to the Hon. Attorney-General with the request that application be made to the Supreme Court for trial of these cases at the earliest day possible, as requested by the First Comptroller.

WM. WINDOM,
Secretary.

Office Supreme Court U. S.
FILED,
FEB 28 1891
JAMES H. McKENNEY
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1890.

No. 1117.

THE UNITED STATES, Appellant,

vs.

HENRY O. EWING.

BRIEF FOR APPELLEE.

GEORGE A. KING,
Attorney for Appellee.

McQUEEN, PR.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1890.

THE UNITED STATES, Appellant,
vs.
HENRY O. EWING. } No. 1117.

Brief for Appellee.

I.

Statement of the Case.

This suit was instituted by the appellee, Henry O. Ewing, against the United States, July 25, 1889, in the District Court of the United States for the Eastern District of Tennessee, for the recovery of $995.15 for official services performed by him as Commissioner of the Circuit Court of the United States for that district, from January 3, 1887, to April 1, 1889.

The items of the claim were briefly as follows:

1.	Final Commitments	$6 25
2.	Temporary	43 25
3.	Orders to pay witnesses	56 95
4.	Acknowledgments to recognizances	30 50
5.	" " "	29 00
6.	Drawing complaints	36 60
7.	Entering returns to process	24 70
8.	Reducing evidence to writing	11 80
9.	Keeping dockets and indexes	565 00
10.	Per diem for "hearing and deciding," etc.	5 00
11.	" " " " " " "	5 00
12.	" " " " " " "	5 00
13.	" " " " " " "	5 00
14.	Suspended because one case not joined with another	4 90
15.	Per diems for "hearing and deciding," etc.	10 00
16.	Per diem " " " " "	5 00
17.	" " " " " " "	5 00
18.	" " " " " " "	5 00
19.	Per diems " " " " "	80 00
20.	" " " " " " "	10 00
21.	Keeping dockets and indexes	42 00
22.	" " " "	21 00

Items 1 to 14 had been presented to and approved by the District Court, as required by the act of February 22, 1875 (18 Stat. 333), and had, since March 3, 1887, been disallowed by the accounting officers of the Treasury (pp. 1, 2).

As to items 15 to 22, the account had not been presented to the Treasury because the United States attorney declined to present it to the court for approval, stating in an indorsement thereon "that his refusal and rejection went solely to the legality of the fees claimed," though "as to the institution of the prosecutions said account was approved" (p. 3).

The case was heard on an answer of the District At-

torney (p. 6) and an "agreement" (p. 9) amounting in substance to a demurrer.

The court allowed items 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 14, 21, and 22, with some deductions from items 3, 6, and 7, on account of allowances made by the Treasury thereon since the suit was instituted (pp. 9, 10). Item 13 was disallowed, because it had been allowed in full by the Comptroller since the petition was filed (p. 10). Items 15, 16, 17, 18, 19, and 20 were disallowed on their merits (p. 10).

As the result, judgment was rendered for the plaintiff November 23, 1889, for $831.05 (p. 11). The costs were taxed at $72.41 (p. 12). From this judgment the United States appealed.

§ 1014 of the Revised Statutes of the United States thus defines the duties of commissioners of the circuit courts:

"For any crime or offense against the United States, the offender may, by any justice or judge of the United States, or by any commissioner of a circuit court to take bail, or by any chancellor, judge of a supreme or superior court, chief or first judge of common pleas, mayor of a city, justice of the peace, or other magistrate, of any State where he may be found, and agreeably to the usual mode of process against offenders in such State, and at the expense of the United States, be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense. Copies of the process shall be returned as speedily as may be into the clerk's office of such court, together with the recognizances of the witnesses for their appearance to testify in the case. And where any offender or witness is committed in any district other than that where the offense is to be tried, it shall be the duty of the judge of the district where such offender or witness is imprisoned, seasonably to issue, and of the marshal to execute, a warrant for his removal to the district where the trial is to be had."

As this section requires the proceedings to be taken "agreeably to the usual mode of process against offenders in such State," the mode of process required in such cases by the law of Tennessee becomes material, and is here given from the code of that State published in 1884:

"§ 5839. The information is the allegation made to a magistrate that a person has been guilty of some designated public offense.

"§ 5840. A magistrate is an officer having power to issue a warrant for the arrest of a person charged with a public offense.

"§ 5842. No person can be permitted [committed] to prison for any criminal matter, until examination thereof be first had before some magistrate.

"§ 5843. The magistrate is required to reduce the examination of the accused to writing if he submits to an examination, and also all the evidence adduced on both sides, and is authorized to take bail or commit the accused, and take all necessary recognizances to enforce the appearance of the defendant, the prosecutor or witnesses, at the proper court.

"§ 5844. For the apprehension of persons charged with public offenses, magistrates are authorized, within their jurisdiction, to issue warrants of arrest, under the rules and regulations in this chapter prescribed.

"§ 5845. Upon information made to any magistrate of the commission of a public offense, he shall examine on oath the informant, reduce the examination to writing, and cause the examination to be signed by the person making it.

"§ 5846. The written examination shall set forth the facts stated by the informant tending to establish the commission of the offense and the guilt of the defendant.

"§ 5847. If the magistrate is satisfied therefrom that the offense complained of has been committed, and there is reasonable ground to believe the defendant is guilty thereof, he shall issue a warrant of arrest.

"§ 5848. A warrant of arrest is an order in writing, stating the substance of the complaint, directed to a

proper officer, signed by a magistrate, and commanding the arrest of the defendant.

"§ 5874. When the defendant is brought before a magistrate upon arrest, either with or without warrant, on a charge of having committed a public offense, the magistrate shall immediately inform him of the offense with which he is charged, and of his right to aid of counsel in every stage of the proceedings.

"§ 5875. The magistrate shall allow the defendant a reasonable time to send for counsel, and, if necessary, shall adjourn the examination for that purpose.

"§ 5876. The magistrate shall, as soon as may be, after the defendant appears, or if the defendant require the aid of counsel, after waiting a reasonable time therefor, proceed to examine the case.

"§ 5877. The magistrate may, however, for good cause, adjourn the examination from time to time, without the consent of the defendant, not exceeding three days at any one time, and, in such case, if the offense is not bailable, or if the defendant does not give the bail required, he shall be committed to jail in the meantime; and, if the offense is bailable, the defendant may give bail in such sum as the magistrate directs, for his appearance for such further examination.

"§ 5881. At the examination the magistrate shall examine the witnesses for the prosecution, on oath, in the presence of the defendant, and such other witnesses, as may be produced by the defendant.

"§ 5882. When the examination of the witnesses on the part of the State is closed, the magistrate shall inform the defendant that it is his right to make a statement in reference to the charge made against him, or that he may waive the same; and such waiver cannot be used against him on the examination before the magistrate, or on trial.

"§ 5887. The evidence of the witnesses shall be reduced to writing by the magistrate, or under his direction, and signed by the witnesses respectively.

"§ 5889. If it appear that an offense has been committed, and there is probable cause to believe the defendant guilty thereof, he shall be committed to jail by an

order in writing, unless the offense is bailable, and the defendant gives sufficient bail as required for his appearance at court.

"§ 5892. On holding the defendant to answer, the magistrate shall take from each material witness examined by him on the part of the State a written undertaking in the sum of two hundred and fifty dollars, to appear and testify at the court at which the defendant is required to answer, on the second day of the term.

"§ 6237. The county jail is used as a prison for the safe keeping and confinement of all persons committed thereto, under the authority of law.

"§ 6238. The provisions of the foregoing section extend, to persons detained or committed by authority of the courts of the United States, as well as the courts of magistrates of this State.

"§ 6239. The jailer is liable for failing to receive and safely keep all persons delivered under the authority of the United States, to the like pains and penalties as for similar failures in the case of persons committed under authority of the State.

"§ 6243. The mittimus or process by which any prisoner is committed or discharged from jail, or an attested copy thereof, shall be regularly filed in its order, and safely kept by the sheriff, or jailer, under his direction.

"Commissioners' fees" are fixed by § 847 of the Revised Statutes of the United States as follows:

"For administering an oath, ten cents.

For taking an acknowledgment, twenty-five cents.

For hearing and deciding on criminal charges, five dollars a day for the time necessarily employed.

For attending to a reference in a litigated matter, in a civil cause at law, in equity or in admiralty, in pursuance of an order of the court, three dollars a day.

For taking and certifying depositions to file, twenty cents for each folio.

For each copy of the same furnished to a party on request, ten cents for each folio.

For issuing any warrant or writ, and for any other ser-

vice, the same compensation as is allowed to clerks for like services."

* * * * * *

"Clerks' fees" (to which those of commissioners are, by the last paragraph above given, assimilated) are fixed by § 828 as follows:

"For issuing and entering every process, commission, summons, capias, execution, warrant, attachment, or other writ, except a writ of venire or a summons or a subpœna for a witness, one dollar.

For issuing a writ of summons or subpœna, twenty-five cents.

For filing and entering every declaration, plea, or other paper, ten cents.

For administering an oath or affirmation, except to a juror, ten cents.

For taking an acknowledgment, twenty-five cents.

For taking and certifying depositions to file, twenty cents for each folio of one hundred words.

For a copy of such deposition furnished to a party on request, ten cents a folio.

For entering any return, rule, order, continuance, judgment, decree, or recognizance, or drawing any bond, or making any record, certificate, return, or report, for each folio, fifteen cents.

For a copy of any entry or record, or of any paper on file, for each folio, ten cents.

For making dockets and indexes, issuing venire, taxing costs, and all other services, on the trial or argument of a cause where issue is joined and testimony given, three dollars.

For making dockets and indexes, taxing costs, and all other services, in a cause where issue is joined, but no testimony is given, two dollars.

For making dockets and indexes, taxing costs, and other services, in a cause which is dismissed or discontinued, or where judgment or decree is made or rendered without issue, one dollar."

The Attorney General has for many years published the following as the proper "Form for Commissioners' Account for Fees" under this statute:

THE UNITED STATES } Charge.
vs.
——— ———

Dates of services.

Drawing complaint, three folios, 45 cents; oath, 10 cents; filing, 10 cents.....

Issuing warrant, $1; entering return, 15 cents, and filing same, 10 cents.....

Issuing subpœna, 25 cents; entering return and filing same.....

Administering oaths to —— witnesses for United States.. .....

Issuing warrant, temporary commitment, $1; return and filing.....

Drawing bond for appearance of defendant with —— sureties, three folios.....

Taking —— acknowledgments, at 25 cents each.....

Drawing —— affidavits of justification, one folio each, and oaths thereto.....

Issuing warrant for appearance at court, return and filing.....

Drawing bond for appearance at court, return, three folios.....

Taking acknowledgment of principal and sureties.....

Drawing justification of sureties, one folio each, and oaths thereto.....

Drawing recognizances of —— witnesses, two folios each.....

Taking acknowledgments of —— witnesses.....

—— oaths to witnesses as to mileage and attendance .....

Drawing order to pay witnesses, —— folios.....
Copy for marshal hearing and deciding case (date) .....
Copy of process for court, —— folios, ——.....

Total.....

Amount carried forward.....

(Register of the Department of Justice for 1883, p. 204; for 1884, p. 228; for 1886, p. 285; "Instructions to Marshals, District Atorneys, and Clerks of the United States Courts, compiled by authority of the Attorney-General," 1889, p. 71.)

II.

Brief of Argument.

The items upon which judgment was claimed in the petition were twenty-two in number. One, the 13th, was disallowed, because since the petition was filed it had been allowed by the Treasury Department. Items 15, 16, 17, 18, 19, and 20 were disallowed on their merits. All the others were in whole or in part allowed.

The order of the court approving the accounts of the commissioner under the act of February 22, 1875, 18 Stat. 333, is *prima-facie* evidence of the correctness of its items; and in the absence of clear and unequivocal proof of mistake on the part of the court, should be conclusive. (*United States* v. *Jones*, 134 U. S. 483, 488.)

If, on the other hand, the officer claiming the account fails, without his own fault, to obtain the approval of the court thereto, he is nevertheless entitled to maintain the action on proof of the actual rendition of the service. (*United States* v. *Knox*, 128 U. S. 230.)

In *United States* v. *Rundlett*, 2 Curt. C. C. 41, 43, 44, it was held by Justice Curtis, in the circuit court, that it was the intention of Congress in requiring proceedings to be taken "agreeably to the usual mode of process against offenders in such State" (Rev. Stat. § 1014), "to assimilate all the proceedings in holding accused persons to answer before a court of the United States to the proceedings had for similar purposes by the laws of the State where the proceedings should take place." This renders it important in this case to inquire into the laws of Tennessee in relation to preliminary examinations before committing magistrates. We have therefore cited above in full all the material provisions of the Code of Tennessee.

1. Warrants of Commitment.

"This item is for mittimuses disallowed as temporary, when, in fact, issued after examination, and really for court, and bond was afterwards taken before the meeting of the court, $6.25."

This disallowance was made in mistake of fact. Rev. Stat. §§ 1014, 1028 require a commitment, and so does § 5889 of the Tennessee Code above cited. The record does not show whether these items include any charges for filing or entering the return, but if so, they are allowable under §§ 828, 847, above cited.

2. Temporary Warrants of Commitment.

These charges are "For temporary mittimuses being disallowed by the Comptroller as unnecessary on the ground that the warrant of arrest is sufficient to hold defendant or commit until examination, $43.25."

This charge, like the other, is fully warranted by those clauses of §§ 828 and 847 of the Revised Statutes which allow to commissioners one dollar for issuing a warrant.

The requirement of § 5877 of the Tennessee Code above cited, is express that in case of adjournment for further hearing, "if the defendant does not give the bail required he shall be committed to jail in the meantime." To commit to jail requires a warrant of commitment, otherwise the imprisonment is unlawful, the prisoner liable to be released on *habeas corpus*, and the jailer will be held liable in damages for false imprisonment. (Rev. Stat. § 1028; *United States* v. *Worms*, 4 Blatch. 332; *Ex parte Morrill*, 35 Fed. Rep. 261, 268; *State* v. *James*, 78 N. C. 455; *State* v. *McCoy*, 1 Baxter, 111; *Touhey* v. *King*, 9 Lea. 422.)

This Court will take judicial notice that there is not in Tennessee any jail of the United States for the confinement of prisoners held under Federal process. Such confinement must therefore necessarily be in a State jail, and §§ 6238 and 6239 of the Code of Tennessee expressly authorize the jails of the State to receive and safely keep persons detained or *committed* by authority of the courts of the United States; and by § 5842 no person can be *committed* to prison for any criminal matter until examination thereof be first had before some magistrate.

§ 1030 of the Revised Statutes of the United States is cited on the other side in support of a contrary view. That section however has no application to commissioners. (*United States* v. *Martin*, 17 Fed. Rep. 150, 155.) If it has, it may perhaps be used to bring a prisoner from the jail into the commissioner's court or office, and to return him to the same custody without a new commitment, but certainly not to authorize his original commitment to jail under the warrant of arrest.

Our views on this point are sustained by the decisions of the Court of Claims in *Stafford* v. *United States*, 25 C. Cls. 280, and of the District Courts of the United States in *Heyward* v. *United States*, 37 Fed. Rep. 764, and

Hoyne v. *United States*, 38 Fed. Rep. 542, 544. The fee bill issued under authority of the Department of Justice also contains these charges for warrants of temporary commitment.

3. Order to Marshal to pay Witnesses.

No error is assigned by the Attorney General on this item.

4. More than one Acknowledgment for Recognizances.

This disallowance is "for more than one acknowledgment for defendants' recognizances, the Comptroller holding that the acknowledgment is joint and not separate, $30.50."

On this charge we cite the language of the U. S. District Court for the District of Maine in *Rand* v. *United States*, 36 Fed. Rep. 671, 674:

"Though fees for taking acknowledgments are given in the fee bill for clerks of courts, and commissioners are for like services allowed the same compensation, it is argued that items of account under this head should be rejected, because a fee is charged for each acknowledgment, instead of one fee for each recognizance acknowledged. The statute which prescribes the fee contains no such rule. It is not in the power of one person to acknowledge an obligation so as to bind another who does not. The responsibility assumed is personal, and should be personally assented to."

The right to the separate fee for each acknowledgment is also sustained in *Barber* v. *United States*, 35 Fed. Rep. 886, 888, and *Crawford* v. *United States*, 40 Fed. Rep. 446, 448, 449, besides being evidently contemplated by the form of fee account given in the published instructions, etc., above cited.

5. Acknowledgments to Recognizances.

This disallowance was "For all acknowledgments to defendants' recognizances, the Comptroller holding acknowledgment unnecessary, $29."

The authorities just cited on the last item are equally applicable to the present; in addition to which we cite *McKinstry* v. *United States*, 40 Fed. Rep. 813, 818, and *Goodrich* v. *United States*, 42 Fed. Rep. 392, 394.

6. Complaints.

This disallowance was "For drawing complaints, disallowed as not authorized under the fee bill, $36.60."

The law allows (Rev. Stat. § 847) "For taking and certifying depositions to file, twenty cents for each folio of one hundred words." The right to charge for drawing these complaints is sustained in *Rand* v. *United States*, 38 Fed. Rep. 665, 666, 667; *Crawford* v. *United States*, 40 Fed. Rep. 446, 448; *McKinstry* v. *United States*, 40 Fed. Rep. 813, 816-818; *Ravesies* v. *United States*, 24 C. Cls. 224; and *Cooper* v. *United States*, 25 C. Cls. 346; as well as by the Register and Instructions of the Department of Justice as above cited. Attention is called to the reasoning in these cases, particularly that in the *Rand* and *McKinstry* cases. §§ 5845 and 5846 of the Tennessee Code, set forth in the opening part of this brief, expressly require the deposition of the complaining witness to be taken in writing by the magistrate. § 1014 of the Revised Statutes of the United States requires United States Commissioners to conform their proceedings to the State practice, and §§ 828 and 847 require it to be paid for.

7. Entering Returns of Process.

This disallowance was "For entering returns to process, Comptroller holding this service not required of commissioners, $24.70."

The action of the Treasury Department in the disallowance of this item appears to have been receded from, and the correctness of the charge conceded before the trial in the court below, and part of it paid. The action of the court in allowing the balance, $9.25, accords, therefore, with the present ruling of the Treasury Department, as it also does with the ruling of the Department of Justice. (See its Register and Instructions above cited.) It is also sustained by *Rand* v. *United States*, 38 Fed. Rep. 665, 666; *Crawford* v. *United States*, 40 Fed. Rep. 446, 449; and *Cooper* v. *United States*, 25 C. Cls. 346.

8. Reducing Evidence to Writing.

This disallowance is "For writing out testimony, Comptroller holding charge not authorized by the fee bill, $11.80."

By rule of the court contained on page 7 of this record, the following requirement is made of each commissioner:

"And when a warrant is returned he will in all cases write out substantially the evidence of each witness as given before him, and return the same to the clerk of this court for the information of the district attorney."

Not only does the rule of court require this service, but the Code of Tennessee, section 5887, as above cited, requires that—

"The evidence of the witnesses shall be reduced to writing by the magistrate or under his direction, and signed by the witnesses respectively."

And—

"For taking down the testimony the magistrate is allowed the same as for taking depositions in civil cases."

2 King's Tennessee Digest, 737.

There seems, therefore, to be no ground for questioning the correctness of the allowance of this item. (*United States* v. *Wallace*, 116 U. S. 398; *Stafford* v. *United States*, 25 C. Cls. 280, 282.)

9. Docket Fees.

This item is for "Fee of dockets, indexes, etc., $565."

This item was allowed by the court below on the authority of *Bell* v. *United States*, 35 Fed. Rep. 889; *Rand* v. *United States*, 36 Fed. Rep. 671, 675, 676; *Hoyne* v. *United States*, 38 Fed. Rep. 542, 544; *Rand* v. *United States*, 38 Fed. Rep. 665, 666; and *McDermott* v. *United States*, 40 Fed. Rep. 217, 221–223.

In *United States* v. *Wallace*, 116 U. S. 398, it was held that a commissioner who by direction of the court keeps a docket is entitled to the compensation for making dockets, indexes, etc., allowed by § § 828 and 847 of the the Revised Statutes.

In *Knox* v. *United States*, 23 C. Cls. 367, 372, 373, affirmed in *United States* v. *Knox*, 128 U. S. 230, the same principle was extended to the case of a commissioner who kept a docket without any express mandate of the court requiring it. It is proper to mention that this point, though not alluded to in the opinion of this court, was before the court in the case, and was fully treated in the brief on behalf of the appellee (pp. 5, 6).

No doubt could now be entertained as to the correctness of the action of the court below in allowing such charges in the case at bar were it not for the proviso to the Deficiency [not Sundry Civil] Appropriation Act of August 4, 1886, 24 Stat. 256, 274.

Since the cases of *United States* v. *Dickson*, 15 Pet. 141, 165, and *Minis* v. *United States*, 15 Pet. 423, 445, it has never been doubted that provisos in an appropriation act are to be construed as mere limitations and restrictions

upon the particular appropriations to which they are annexed, unless there is something in the context which imperatively requires a greater force to be given to them. This view of the effect of the proviso here in question is supported by the consideration that neither the act of 1886, which is relied upon by the United States, nor any other statute, relieves the commissioner of the duty of keeping a docket. That duty remains in full force—doubly so in this case, where it is required both by the rule of the court, which was held to be a lawful requirement in the *Wallace* case, and by the general character of the duties of the commissioner, which were held in the *Knox* case to require such dockets to be kept, independently of any such orders. It would be highly unjust to compel the commissioner to continue to keep a docket, and then deprive him of all compensation for the service when performed.

It can hardly be supposed that Congress intended such services to be performed gratuitously. Commissioners, like clerks of court, but unlike marshals and district attorneys (Rev. Stat. §§ 770, 781), receive no regular salaries whatever for extra services over and above those covered by the fee bill; and the theory upon which they are compensated is that of paying them specifically for each particular act of service. In re *Clerk's Charges*, 5 Fed. Rep. 540; 6 Opin. Atty. Gen. 58.

Wherever a statute is susceptible of two constructions, one consistent with right and justice, and another requiring injustice, the former and just construction should be given. (*Broughton* v. *Pensacola*, 93 U. S. 266; *United States* v. *Central Pacific Railroad Company*, 118 U. S. 235, 240.)

This whole question is so satisfactorily discussed in the *Rand* and *McDermott* cases above cited in the 35th and 40th Federal Reporters, that we submit it upon the full and able opinions in those cases.

10. Per Diem in Case against Maggie Clift.

This was an item disallowed by the Comptroller "For per-diem fee in case against Maggie Clift, where three witnesses were heard on the first day and the case continued at defendant's request, $5."

This charge was sustained by the court below, and was clearly allowable under the terms of the fee bill, "for hearing and deciding on criminal charges, $5 a day for the time necessarily employed." (*United States* v. *Jones*, 134 U. S. 483; *Crawford* v. *United States*, 40 Fed. Rep. 446, 449, 450.)

The suggestion is made in the able brief filed on behalf of the United States (p. 9) that the functions of a commissioner are ministerial only. As directly opposed to this view, however, see *United States* v. *Jones*, 134 U. S. 483, and *United States* v. *Schumann*, 2 Abb. U. S. 523.

11. Per-Diem Fee in Case against Martin Turner, $5.

Same remarks apply.

12. For Per-Diem Fee in Case against James Johns, $5.

Same remarks.

13. For Per-Diem Fee in Case against S. L. Marshbanks, $5.

This item was allowed by the Treasury Department before the trial of this case in the court below, and was therefore stricken out.

14. Charges in Case not Joined with Some Other Case.

No error is assigned by the Attorney General on this item.

15, 16, 17, 18, 19, 20. Per-Diem Fees.

These items, amounting in all to $115, were disallowed.

An examination of the facts, as stated in the petition, pp. 3, 4, and found by the court below, p. 10, shows this action to be a plain error, in the light of the decision of this court in *United States* v. *Jones*, 134 U. S. 483. The case now at bar was decided November 23, 1889, while the opinion of this court in the *Jones* case was not rendered till the 24th of March, 1890. Had the opinion of this court in the *Jones* case been before the court below, these items would unquestionably have been allowed.

Appellee in this case concedes to the fullest extent, that as he did not—and could not by law—take an appeal, he is entitled to ask nothing more than an affirmance of the judgment below. He can not have it increased. If, however, in consequence of an opinion on the part of this court adverse to that of the court below on any one or more of the items allowed, the judgment should be reduced, then the appellee claims the right to have erroneously disallowed items allowed him here, in order to make up the deficiency. The question in this court is as to the correctness of the *judgment* below—not the validity of the grounds given for it in the *opinion*. (*Pennoyer* v. *Neff*, 95 U. S. 714, 722.)

Outside of the opinion of the court below, and the recital on page 11 preliminary to the judgment, this court could only know from the petition and judgment that suit was brought for $995.15, and judgment rendered for $831.05. If there is anything in the record which sustains a judgment for that amount, or any part of it, the appellee is entitled to the full benefit of it. The United States can not by its appeal deprive him of any more of that amount than was errroneously adjudged in his favor. (*United States* v. *Mosby*, 133 U. S. 273, 289.)

21, 22. Docket Fees.

All the remarks made in relation to item 9 above, on the subject of docket fees, apply to these items. See also the remarks of the court below in its opinion, page 10, and the case of *Rand* v. *United States*, 38 Fed. Rep. 665, 666, cited by the court.

It is submitted that the judgment of the District Court should be affirmed.

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